No. 15,200

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES TUENGEL,
Appellant,

vs.

THE CITY OF SITKA, ALASKA, an incorporated Alaska municipality, BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, a corporation, and SITKA COMMUNITY HOSPITAL,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, First Division.

APPELLEES' BRIEF.

FAULKNER, BANFIELD & BOOCHEVER,
P. O. Box 1121, Juneau, Alaska,
Attorneys for Appellees.

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STATEMENT OF THE CASE.

Charles Tuengel, hereinafter referred to as appellant, brought suit in the United States District Court for the District of Alaska for damages alleged to have resulted from a fall down basement stairs at the Sitka Community Hospital in Sitka, Alaska. Sitka, a town

of 1,985 population according to the 1950 census, had secured the use of a building owned by the Board of National Missions of the Presbyterian Church of the United States of America for use as community hospital. (Tr. Vol. III, p. 291.) The hospital was operated by the City with the Board of National Missions having the right to use part of the building as an infirmary for students of the Sheldon Jackson School also operated by the Board. The City of Sitka and the Board of National Missions were named as defendants in the suit and the case was tried before a jury which rendered a verdict in favor of the defendants, the appellees herein. After due consideration of a Motion for New Trial, the learned trial judge entered judgment in favor of defendants in accordance with the verdict, from which judgment appellant has appealed. Appellant has made the jurisdictional statement required.

The facts on this appeal may be set forth as follows in view of the well accepted principle that, in considering a case on appeal, the testimony supporting the verdict will be considered if substantial, and evidence to the contrary will be rejected. *Fidelity and Casualty Co. of New York v. Griner,* 44 F.2d 706 (9th Cir.).

On or about the evening of November 17, 1951, appellant called at the Sitka Community Hospital at the request of a patient, Alex Cresa, for the purpose of cutting Mr. Cresa's hair. (Tr. Vol. II, p. 57.) A nurse, Mrs. Srein, an employee of the City of Sitka (Tr. Vol. III, p. 306), was on duty and directed him

to Mr. Cresa's room, informing appellant that it was the third room to the left, which directions were repeated by appellant. (Tr. Vol. III, p. 306.) Instead of going to that room and knocking for admission, appellant went to the fifth door on the left and looked in. This was a bathroom. (Tr. Vol. II, p. 18.) He then proceeded to open the next door, being the fourth door on the left, without first knocking, (Tr. Vol. II, p. 19), and fell down the basement stairs. The door to the basement was marked with a large white sign with large black letters stating "BASEMENT". This sign was well illuminated. (Tr. Vol. III, pp. 304, 309, 323, 324, 325, 331, 342.) The doorway opened towards the stairway, which led to an exit from the building, and the stairway was lighted at the time of appellant's fall. (Tr. Vol. III, pp. 307, 311.)

Appellant was not wearing his glasses, which were in his pocket, and without them could see nothing close in front of him. (Tr. Vol. III, p. 396.)

On hearing appellant fall, Mrs. Srein immediately came to his assistance. Appellant was not unconscious but did have a skinned elbow. He refused to see a doctor as requested by the nurse (Tr. Vol. III, p. 308), and left the hospital by himself. He proceeded to drive his car home.

ARGUMENT.

INTRODUCTION.

Counsel for appellant has set forth his argument under twelve different headings. For the purpose of

orderliness, this brief will take up appellant's points in the order raised.

I.

THE COURT ADEQUATELY INSTRUCTED THE JURY PERTAINING TO PROOF OF CONTRIBUTORY NEGLIGENCE.

Counsel for appellant attempts to take certain parts of the court's instructions out of context in an effort to contend that proper instructions were not given pertaining to the recognized fact that the burden of proving contributory negligence is on the one who pleads it, in this case the appellees.

It is well established that instructions must be regarded as a whole, and the court adequately covered the question of contributory negligence and the burden of proving the same. (Tr. Vol. I, p. 113.) Thus in Instruction No. 8 the court stated:

> "In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, to prove such issue by a preponderance of the evidence." (Tr. Vol. I, p. 113.)

The instruction goes on to explain in further detail what is meant by the burden of proof. Instruction No. 3 specifies, in the last paragraph thereof:

> "If the plaintiff has proven, by a preponderance of the evidence, any of such charges of negligence against the defendant City of Sitka, and the charge with respect to improper construction against the defendant Board of National Missions, and if your answers to the other questions

> are in the affirmative, you should find for the plaintiff and against the party or parties whom you may find responsible; *provided, however,* that if the defendant has proven *by a preponderance of evidence* that the plaintiff was negligent and that such negligence proximately contributed to the injuries sustained by plaintiff, then he cannot recover." (Emphasis ours.) (Tr. Vol. I, p. 103.)

The court further stated, in Instruction No. 6:

> "It is for you to say whether such contributory negligence, if any, has been established, and the burden of establishing such a defense by a preponderance of the evidence is on the defendant." (Tr. Vol. I, p. 107.)

It is difficult to understand how the court could have more clearly stated the burden of proof pertaining to contributory negligence.

It is true that counsel may be able to pick out a sentence from the instructions at random which would give an erroneous impression. The instructions must be considered as a whole, however, and in fact the court so instructed the jury in Instruction No. 13 (Tr. Vol. I, p. 120.) It is respectfully submitted that no error was committed by the court in instructing on this issue.

II.

THERE WAS NO ERROR IN THE TRIAL COURT'S INSTRUCTION No. 7 WHEREBY THE JURY WAS INSTRUCTED PERTAINING TO ASCERTAINMENT OF DAMAGES IN THE EVENT OF A FINDING FOR THE APPELLANT.

Counsel in his brief refers to Instructions No. 6 and 7, but apparently his argument on this point deals only with Instruction No. 7 wherein the court stated:

> "However, it must be shown, before damages may be allowed for any such aggravated injury or condition, that such was the proximate result of the negligence complained of, and not the result of any inattention to such injuries or failure to observe the reasonable advice or instructions of competent physicians on the part of the plaintiff; and that any such aggravated condition which may have been caused by the fault of the plaintiff may not be considered as an element of damage." (Tr. Vol. I, p. 110.)

Counsel contends that this issue has not been raised by the pleadings and the proof. This ignores the fact that the complaint alleged elements of damage which were denied in the answer. Therefore, any question pertaining to damages was raised by the pleadings. Furthermore, proof was submitted touching on this exact subject. Thus appellant stated:

> "Q. And when did Doctor Degge tell you that from now on you should just exercise your arm?
>
> A. After he took my arm out of the cast, that is when he told me that——
>
> Q. What date was that? Do you remember what month?
>
> A. I don't remember. It has been so far back.

Q. Actually, wasn't that in April of 1952?
A. I don't remember.
Q. And have you been exercising your arm?
A. I have tried it numerous times.
Q. But you haven't been doing it?
A. No, sir. I pay for it when I do." (Tr. Vol. II, p. 63.)

See also Tr. Vol. II, p. 44. In addition, see Tr. Vol. II, p. 247 and Tr. Vol. III, p. 387, wherein Doctors Moore and Shuler explained the desirability of exercise in appellant's case. Furthermore, any objection pertaining to damages would appear to be completely irrelevant on this appeal since the jury has found that the appellant was entitled to no damages. Had the jury returned a verdict for a small sum of money, appellant might be in a position to raise an objection such as this, but questions pertaining to damages are not material on an appeal from a jury verdict in favor of the defendants.

III.

IN VIEW OF THE SIGN ON THE BASEMENT DOOR AND THE CIRCUMSTANCES INVOLVED IN THIS CASE, THE QUESTION OF NEGLIGENCE IN REGARD TO THE CONSTRUCTION AND MAINTENANCE OF THE DOOR WAS A QUESTION FOR THE JURY.

In view of the sign on the basement door and the circumstances involved in this case, the question of negligence in regard to the construction and maintenance of the door was a question for the jury, and

furthermore, counsel failed to request an instruction to the contrary. Counsel contends that the construction and maintenance of the cellar door of the hospital constituted negligence in itself, regardless of the fact that a sign was placed on the door and that the door was not for use by the public generally. At the outset it is to be noted that counsel presented no requested instruction to the effect that the construction and maintenance of the cellar door and stairway was negligence in itself. Having failed to make a timely request for an instruction on this subject, and having failed to make any objection to the court's instruction on this subject, counsel is precluded from raising Questions No. 3, 4 and 5 on this appeal.

> "Generally, unless the error is fundamental, or the manner of submitting the case may have caused a miscarriage of justice, an objection to the submission of an issue or question of fact, the form of submission, or irregularities therein, when first made on appeal, comes too late. Likewise, it cannot be objected for the first time on appeal that the court erroneously submitted a question of law to the jury, or a mixed question of law and fact as a question of fact, or that the issues raised by pleas to the jurisdiction and to the merits were submitted at the same time."
>
> 4 C.J.S., pp. 606-608.
>
> *U. S. v. Atkinson,* 76 F.2d ..... aff'd 56 S.Ct. 391, 297 U.S. 157;
>
> *Buffalo Ins. Co. of City of Buffalo, N.Y. v. Bommarito,* 42 F.2d 53;
>
> *Martin v. Washington Times Co.,* 89 F.2d 230.

Regardless of the fact that the issue as to whether the court erred in leaving to the jury the question of negligence pertaining to the construction and maintenance of the door or the steps is not properly before this honorable court, in view of the fact that counsel presented no request for instruction to that effect or any objection to the instruction of the court concerning this subject, it is felt that the objections are entirely without merit and unsupported by the cases cited by appellant.

The case of *Senner v. Danewolf,* cited by appellant as 9 P.2d 240, apparently involves an erroneous citation since no such case could be found in that volume. Moreover, the facts of the case, as stated by attorney for the appellant, are readily distinguishable in that there was no question of the plaintiff in the *Senner* case failing to follow directions and there was no adequate sign properly illuminated indicating the presence of the stairway. These facts must be regarded as established in the subject case, as, on appeal, facts will be regarded as most favorable to the party prevailing under a jury verdict.

In the case of *Foren v. Rodick,* 38 A. 175 (Me.), the facts are in sharp contrast with the subject case in that a physician's office was located on the second floor of a building and the only sign present indicated that his office was in the building. This sign was located between two similar doors, one of which, without any warning sign whatsoever, opened over a stairway. The court pointed out that there was nothing to inform the plaintiff as to which door to take. In

the subject case the jury must be regarded as having found that there were proper instructions given to the appellant as to which door to take and there was also the well illuminated sign on the door.

The case of *King v. New Masonic Temple Association,* 125 P.2d 559, (erroneously cited in appellant's brief as 599), is not in point since there was no question of proper directions having been given or a sign indicating the depression in the floor which caused plaintiff's injury. Moreover, the case was decided on a motion for nonsuit by the defendant and the reviewing court accordingly looked at the facts in the most favorable light to the plaintiff with the result that it was decided to remand the case so that it could be tried by a jury.

In the only other case cited by appellant, being that of *Morgenstern v. Sheer,* 125 A. 790 (Md.), there was disputed testimony as to whether there was a sign on the door stating "Positively No Admittance". The jury found for the plaintiff and the court on appeal stated:

> ". . . the plaintiff offered evidence tending to show that there were so such warning signs at the time of the accident, and it was for the jury to determine the issue of fact thus raised."

Had the learned trial court decided the case for the defendants without submitting the issues to the jury, appellant's authorities might carry some weight.

Actually, there are a number of authorities holding that, under circumstances similar to those in the sub-

ject case, as a matter of law there is either no negligence on the part of the defendant or contributory negligence on the part of the plaintiff. Thus in the case of *Knapp v. Connecticut Theatrical Corp.,* 122 Conn. 413, 190 A. 291, it was held that a theatre owner was not liable to a theatre patron who, in searching for the men's toilet, mistakenly opened a door leading to the basement of the building and fell over a waste-paper container on the unlighted stairway. The door had no sign on it. A similar holding was made in the case of *Thalhimer Bros. Inc. v. Casci,* 160 Va. 439, 168 S.E. 433. In *Clark v. Cleveland Drug Co., Inc.,* 204 N.C. 628, 169 S.E. 217, a customer in a store asked to use a phone and was led to the phone in the rear of the store. After using the phone, the customer opened a door attempting to return to the front of the store, and fell down a dark basement stairway. A judgment of dismissal was affirmed, the court holding:

> "It was perfectly obvious that plaintiff's unfortunate injury resulted directly from her want of judgment or her want of care."

See:

Collins v. Spragues Benson Pharmacy, 124 Nev. 210, 245 N.W. 602, and

Napier v. First Congregational Church of Portland, 70 P.2d 43 (Ore.).

In any event, it is clear that, at best, the issues raised by these objections of the appellant were matters to be decided by the jury and the court properly instructed the jury in that regard.

IV.

THERE WAS NO FAILURE ON THE PART OF NURSE SREIN TO USE DUE DILIGENCE IN DIRECTING APPELLANT TO THE ROOM OF PATIENT CRESA, AND APPELLANT FAILED TO REQUEST AN INSTRUCTION TO THE EFFECT THAT HER DIRECTIONS CONSTITUTED NEGLIGENCE. APPELLANT FURTHER FAILED TO OBJECT TO THE INSTRUCTIONS GIVEN PERTAINING TO THIS ISSUE.

Counsel contends that it was error for the court to leave to the jury the question of whether Nurse Srein was negligent in directing appellant to the room of the patient Cresa. The nurse instructed appellant that he was to go to the third room on the left, which directions were repeated by appellant. (Tr. Vol. III, p. 306.) The court left it to the jury to determine whether "the nurse did give inadequate or improper instructions to the plaintiff . . . and that such act was in effect negligence . . ." (Instruction No. 5, Tr. Vol. I, p. 105.)

Counsel for appellant made no objection to this instruction, nor did he request the court to instruct, as a matter of law, that Nurse Srein was negligent in the manner in which she gave instructions. Counsel now contends that it was the duty of Nurse Srein to direct appellant to the room of the patient Cresa by personally escorting him to that room. It would appear self-evident that, at most, this would be a jury question. No evidence was presented as to any custom in hospitals whereby nurses are required personally to take visitors to the rooms of patients.

As explained supra in the discussion of point III, an issue pertaining to the submission of issues to the

jury cannot be complained of for the first time in the appellate court.

Counsel cites cases involving concealed peril to invitees. No such issue is presented in the subject case since, if appellant had followed the instructions which were given to him, he would never have reached the basement door, assuming that such door with its well illuminated sign could possibly be regarded as a concealed peril.

Accordingly, it is respectfully submitted that no error was committed by the court in leaving the issue to the jury pertaining to the directions given by the Nurse Srein.

V.

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE DUTY OF THE APPELLEE BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH TOWARD THE APPELLANT.

Counsel contends that it was error for the court to instruct the jury, in Instructions No. 5, 6 and 7, that appellee Board of National Missions would be liable for negligence for improper construction of the cellar door upon the premises, but not for any possible negligence of the Nurse Srein in giving directions. The undisputed testimony was that Nurse Srein was an employee of the City of Sitka and not an employee of the appellee Board. (See Tr. Vol. III, p. 306.)

Furthermore, it is difficult to see how any error which might possibly have been made in instructions

pertaining to the liability of the Board of National Missions would be material on this appeal in view of the fact that the jury found in favor of both appellees. The most that the appellant could have desired would be an instruction to the effect that the Board would be liable under the same facts and circumstances as the appellee City of Sitka. Since the jury found that the appellee City of Sitka was not liable, any error pertaining to instructions as to the Board's liability is clearly immaterial.

The case of *Tipps v. United States,* 70 F.2d 525, pertaining to the payments required by one who held over under a lease is hardly in point. The case of *Willett v. Pilotte,* cited by appellant at 190 N.E.2d 840, is evidently an erroneous citation as there is no such volume and the case does not appear in 19 N.E.2d. In any event, the facts as stated by counsel are readily distinguishable in that there was no question of the seller of Christmas trees giving erroneous instructions or in regard to maintaining a proper sign properly illuminated. The case of *Baseball Pub. Co. v. Bruton,* 18 N.E.2d 662, pertaining to the distinction between a lease and a license, would appear to have no bearing on the subject case since it was clear that the appellee City of Sitka had the exclusive control of the portion of the premises involved in this accident at the time of the accident.

The arrangement by which the City of Sitka occupied the ground floor of the hospital was testified to by the witness Leslie Yaw as follows:

"A. At that time the City of Sitka was without hospital facilities. I happened also to be a member of the hospital committee of Sitka, and this committee was charged with the responsibility of making some arrangements whereby mothers and emergency cases could be taken into a hospital, so it was in my mind at the time and represented to our Board from whom consent was given that we do this as a community service to help meet a community need.

* * * * * * *

Q. Mr. Yaw, who—what was the nature of the arrangement? Who was in charge of the ground floor of the hospital?

A. After our agreement, the City of Sitka."

Certainly an organization which charitably permits a city to use its property for the conduct of a badly needed hospital, regardless of whether the arrangement by which the use of the property is permitted is called a lease or otherwise, should be held to no greater liability than that of a landlord. That liability extends only to injuries resulting from defective construction of a building and "liability of the landlord does not arise unless he has reason to expect that the tenant will not take steps to remedy or guard against injury from the defect." (52 C.J.S., Sec. 422, p. 76; 32 Am. Jur., Sec. 665.) In fact, it has been held that one who permits his property to be used by the public, without compensation, is not liable for injuries to invitees even when due to latent defects in the premises. See *Davis v. Schmitt Bros., Inc.,* 192 N.Y.S. 15, 199 App. Div. 683.

Accordingly, it is respectfully submitted that the issue raised by this question of appellant's is immaterial on this appeal and, furthermore, that the court properly instructed the jury as to the liability of the Board of National Missions.

VI.

THE COURT PROPERLY PERMITTED CROSS-EXAMINATION OF THE APPELLANT REGARDING HIS LETTER TO A MR. DAVIDSON; AND APPELLANT FAILED TO OBJECT TO THAT CROSS-EXAMINATION.

On cross-examination, appellant was shown a letter which he admitted he had written and testified concerning a statement made in that letter regarding the presence of a sign on the basement door. The letter involved was exhibit to the appellant and was also furnished his counsel. At the time of the questioning of appellant, counsel for appellant interposed an objection but then withdrew the objection, stating "Oh, let him answer it—I don't care." (Tr. Vol. II, p. 68.) Counsel made no request to have the entire letter introduced into evidence.

Having failed to object to the cross-examination of the appellant at the time that cross-examination was conducted, and in fact having consented to the asking of the questions, counsel is not in a position to object to the cross-examination on appeal. Counsel further states that appellees should have been required to put the entire letter into evidence, yet no objection to that effect was raised by counsel. Counsel further

states that he was not permitted to identify adequately the letter by showing the entire contents and address thereon. It is respectfully submitted that counsel for appellant never endeavored to introduce the entire letter into evidence.

It is further submitted, however, that, in the absence of an offer of proof to show any relevancy with reference to the additional portions of the letter other than that previously testified to by the appellant, counsel would not have had the right to submit the remaining portions of the letter into evidence. Appellees readily admit that appellant was entitled to present any other portions of the letter which would tend to explain the admission pertaining to the sign on the door which was brought out in cross-examination. Learned counsel for the appellant, however, made no offer of proof in that regard. The authorities cited by appellant do not support his contention with reference to the introduction into evidence of the entire letter.

In the case of *Johnson v. Charles William Palumbo Co.,* 157 A. 902, (Conn.), a blueprint which was not in evidence and which was not shown to have been made by the plaintiff was held not to be a proper subject for questions on cross-examination. It is submitted that a different ruling would be involved had the plaintiff made a prior written statement contradicting in part his oral testimony.

The Supreme Court case of *C. M. and St. P. Ry. Co. v. Artery,* 137 U.S. 507, 520, appears to support the

appellees' position in this regard rather than appellant's contentions. The court stated therein:

> "We think the Circuit Court erred in laying it down as a rule that a written statement signed by a witness and admitted by him to have been so signed, cannot be used in cross examining him as to material points testified to by him . . ."

Similarly, in *Chicago, M. & St. P. Ry. Co. v. Harrellson,* 14 F.2d 893 at 897, it was held that only the parts of a deposition bearing on the particular transaction concerning which impeachment was sought should have been read to the jury. To the same effect is *Charlton v. Kelly,* 156 F. 433, decided by this honorable court, wherein it was stated:

> "For the purpose of impeachment a deposition is to be regarded as any other statement or declaration of the witness, and it is not necessary that the whole of the deposition be read or any greater portion thereof than that which directly relates to the proposed impeachment."

In *New York Central Ry. Co. v. Dunbar,* 296 F. 57 at 60, it was held that the only proper method of securing testimony pertaining to a previous statement was to limit the testimony to the portions of the statement involving contradictions and that it was proper to exclude the remaining portions of the statement.

The case of *Moore v. Ray,* 22 P.2d 45, is directly in point in that portions of a written statement were used in cross-examination of the appellant and the court refused appellant's motion to admit the whole statement in evidence. The court held:

> "The witness was then interrogated as to one paragraph dealing with the speed of the approaching car and its position on the highway and the condition of its lights. Respondent did not offer the statement in evidence but, on redirect examination, appellants offered the entire statement. To this an objection was sustained. This was proper for only that portion dealing with the same subject matter touched upon in the examination may be inquired into upon redirect examination, and there was here no showing that the proffered portions of the statement referred to the same subject."

See also *State v. Main,* 216 P. 731, 37 Ida. 449; *State v. Newcomb,* 119 S.W. 405, 220 Mo. 54; *DeLucia v. Polio,* 140 A. 733, 107 Conn. 437; *Culver v. S.H.R. Co.,* 101 N.W. 663, 149 Minn. 141; *Colby v. Reams,* 63 S.E. 1009, 109 Va. 308. In the case of *Rich v. Consumer's Petroleum Co.,* 53 N.E.2d 286 (S.C.), it was held to be error for the court to admit into evidence other isolated portions of a statement not related to cross-examination questions.

The points raised by counsel on this question on appeal are not properly before this court due to counsel's failure to object to the questions on cross-examination and his further failure to request the court to permit introduction of the entire letter. Had such request been made, however, the court would certainly have been justified in denying the same as to all portions of the letter not relevant to the subject matter touched upon in the cross-examination pertaining to the letter.

VII.

A CONVICTION OF CRIMINAL CONTEMPT OF COURT MAY BE SHOWN TO IMPEACH THE CREDIBILITY OF A WITNESS.

Counsel contends that "the court erred in permitting appellees to read to the jury the inducement recital in appellees' Exhibit A and thereby to prejudice the jury into bringing to the attention of the jury the more serious charge of tampering with the jury with which appellant was never convicted." (Appellant's brief, p. 68.) At the outset, it must be pointed out that Exhibit A merely constituted the record of conviction. It was not a transcript of the entire proceedings before the court in the contempt case. Counsel is in error in stating that the court permitted appellees to read to the jury the inducement recital. Although at one time request was made to the court to permit reading of Exhibit A, the transcript reveals that the exhibit was never read to the jury.

Counsel's argument primarily does not deal with the question presented, being question 11 and quoted on page 68 of appellant's brief, as set forth above. Counsel's argument concerns the question of whether, under Alaska law, a witness may be impeached by the record of a judgment for conviction of a criminal contempt. Since this question is not set forth in appellant's statement of points to be considered on this appeal, it may not be raised in appellant's brief, and it is respectfully submitted should not be considered on this appeal. In the case of *Western Nat. Ins. Co. v. LeClare*, 163 F.2d 337, this honorable court stated:

> "Three points argued by appellant were that the evidence is neither clear nor convincing; that it

> does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

The question which was set forth by counsel in his statement of points concerns the inducement recital in the judgment of conviction. This issue may not be raised on this appeal since no objection was taken to the introduction of the exhibit on that ground and, moreover, appellant's motion to strike the exhibit did not set forth that basis. When the exhibit was first offered in evidence, counsel for appellant objected as follows: "If the court please, I object to that as incompetent, irrelevant and highly prejudicial. You can't attack a man's character until he has offered his own good character in evidence. I submit you can't do that." (Tr. Vol. II, p. 69.) This constituted but a general objection made specific by the last two sentences of the objection and the specific grounds, as stated, do not apply in a civil case, particularly where, as in Alaska, statutory law specifically states that:

> "It may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime."
>
> Section 58-4-61, ACLA 1949.

The law pertaining to objections such as made by counsel is set forth as follows:

"A mere general objection such as one which only states that the party objects, that the evidence is incompetent, irrelevant, and immaterial, or that it is 'clearly improper and inadmissible', is ordinarily insufficient to present any question for review, except where the objection is such that the trial court cannot fail to understand the ground upon which it is based . . .

"When a specific objection has been made, the appellate court will consider no grounds or reasons other than those that have been specified or urged in the trial court; and, if an improper or wrong reason or ground is assigned in objecting to evidence, the appellate court will treat the evidence as if no objection had been taken."

4 C.J.S., Sec. 290, pp. 572-575.

Furthermore, when the actual record was presented for introduction into evidence, counsel for appellant stated: "I don't know whether it is true or not but we will admit it." (Tr. Vol. II, p. 70.) Accordingly, the record of the conviction of criminal contempt was introduced into evidence without any objection by counsel calling the court's attention to the grounds he now arises on appeal.

Subsequently, counsel filed "Plaintiff's Motion to Strike Defendants' Exhibit A and Evidence Relative Thereto". This motion is based on the allegation that a criminal contempt does not constitute a crime under the provisions of Sec. 58-4-61, ACLA 1949. No mention is made, again, in the motion to strike of the inducement portion of the judgment of conviction of contempt. It is respectfully submitted that, having failed to raise the objection at the trial, counsel is

precluded from contending on appeal that the exhibit should not have been admitted for the reason that the inducement recital in the judgment set forth the fact that the appellant was originally accused of the charge of tampering with the jury.

Had appellant raised that issue, it is quite possible that the court might have stricken from the judgment record the recital portion thereof, although it is respectfully submitted that in no event was it error to admit the record of conviction, which is the specific means stated in Sec. 58-4-61, ACLA 1949, of proving a conviction. That statute states ". . . except that it may be shown by the examination of the witness *or the record of the judgment* that he has been convicted of a crime." (Emphasis ours.) See also *Meeks v. United States,* decided by this honorable court, 163 F.2d 598.

Moreover, the recital information contained in the judgment could not constitute prejudicial error since it specifically showed that the appellant was not guilty of the crime of attempting to influence a juror but that he was guilty of contempt of court for directly violating the order of the court.

Although the question is not presented on appeal, counsel in his brief argues that a witness may not be impeached by proof of conviction of a criminal contempt. As indicated above, this objection was not made at the time of the introduction into evidence of Exhibit A, the record of the conviction. The question was presented by appellant's subsequent motion to strike, but it has not been set forth as a ground

for appeal in appellant's statement of points. Since counsel has discussed this matter at length in his brief, appellees will comment on this issue, although it is respectfully submitted that it is not properly presented for consideration on this appeal.

Defendants agree with plaintiff that proceedings for the punishment of contempts of court are *sui generis* in the sense that the ordinary procedural requirements of the Sixth Amendment and the due process clause do not apply to such proceedings. However, it is only the procedure and not the substance of the offense which is *sui generis*. In the Territory of Alaska a criminal contempt is a crime by virtue of the express statutory terms governing contempts and crimes. This conclusion is further buttressed by the authoritative language of certain U. S. Supreme Court decisions.

Section 58-4-61, ACLA 1949, states that ". . . it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime." The question then is what constitutes a "crime" within the meaning of the impeachment statute. Section 65-2-1, ACLA 1949, states that "a crime or public offense is an act or omission forbidden by law, and punishable, upon conviction, by either of the following punishments:

First—Death;
Second—Imprisonment;
Third—Fine;
Fourth—Removal from office;
Fifth—Disqualification to hold or enjoy any office of honor, trust or profit."

From this it would certainly appear that a contempt which is punished in order to vindicate the power and authority of the court is a crime because Section 57-6-2 vests the court with the power to punish contempt by fine or imprisonment or both. This is the view which was taken by Judge Cushman in the case of *In Re Ashland,* 4 Alaska 486 (Third Div., 1912), at page 492, where it is stated:

> "Contempts of court are punishable by fine, or imprisonment, or both. Section 610, Pt. 4, Carter's Codes. A contempt of court, therefore, is a crime as defined in Section 2, Pt. 2, Carter's Codes, supra."

The sections of Carter's Codes cited by the court are precisely the same ones as are now embodied in Alaska Compiled Laws Annotated 1949 and cited above. In the *Ashland* case, *supra,* the court refused to issue a liquor license to a person who had been convicted of a criminal contempt of court, this refusal being based upon his having violated the laws governing the sale of intoxicating liquors.

The case of *Blackmer v. U. S.,* 284 U.S. 421; *Myers v. U. S.,* 264 U.S. 95; *Bessette v. Conkey Co.,* 194 U.S. 324, and *Armstrong v. U. S.,* 18 F.2d 371, are cited by appellant in support of his position. However, an examination of those cases reveals that they were concerned with the procedure to be followed in certain contempt cases and not with the substantive nature of a contempt of court, and to that extent they are of no value as authority on the issue here under consideration. On the contrary, the language of those

and other Supreme Court cases is more helpful to the position of appellees. The whole thing was summed up very well by Chief Justice Taft in *Ex parte Grossman,* 267 U.S. 87 at page 116, where he quotes the language of *Gompers v. U. S.,* 233 U.S. 604, to the effect that criminal contempts are crimes just as much as though a trial by jury were had. It might be well at this point to quote the language of *Gompers v. U. S., supra,* at page 610:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crime. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. (Citations). It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. *If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* (Emphasis supplied). So truly are they crimes that it seems to be proved that in the early law

> they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N.S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. (Citations)."

In *Ex parte Grossman, supra,* the Supreme Court determined that a criminal contempt was an offense pardonable by the President. It might be said that the word "offense", as contained in the United States Constitution, is a broader one than the word "crime", but if we refer back to Sec. 65-2-1, ACLA 1949, we find that it speaks of "a crime or public offense", so that the two terms are virtually equated.

Niemeyer v. McCarty, 51 N.E.2d 365, and the other state court decisions cited by appellant are of little value in determining the nature of a criminal contempt in the Territory of Alaska. For example, in *Niemeyer v. McCarty, supra,* it was held that a contempt conviction cannot be used for impeachment, but that was under a statute which allowed impeachment only by showing a conviction of an infamous crime and contempt was not statutorily so classified.

The theory of the rule allowing impeachment by proof of commission of a specific crime is that there is a reasonable connection between criminality and mendacity. It would certainly seem that one who has been convicted of contempt of court for attempting to influence a juror has shown the requisite culpability to allow him to be impeached therefor. The ruling of the court on this matter was entirely in accordance with the explicit language of the Alaska statutes, the

nature of criminal contempt as revealed by U. S. Supreme Court decisions and decisions of the Alaska courts, and the policy of the Alaska statute on impeachment of witnesses.

It is contended in the brief of appellant that only the record of the judgment of conviction should have been put into evidence in the case, and not the entire record of the contempt proceedings. So far as appellees know, it was only the record of judgment which was read to the jury and entered as an exhibit.

Appellant failed to raise any objection during the trial to the introduction of Exhibit A on the grounds set forth in his statement of points relied upon on appeal, paragraph 11, and, furthermore, it is respectfully submitted that, in any event, it was not error of the learned trial judge to permit the introduction of the record of conviction under the express provisions of Alaska statutory law.

VIII.

NO WITNESS WAS UNREASONABLY, SEVERELY OR REPEATEDLY CROSS-EXAMINED.

Counsel contends that the witness Cresa was cross-examined unduly severely and repetitiously.

> "Unless there has been a clear prejudicial abuse, the appellate court will not seek to review or control the exercise of the trial court's discretion with reference to the . . . cross examination . . . of witnesses . . ."
>
> 5 *C.J.S.*, Sec. 1608, p. 508.

The trial court did not feel that the witness Cresa, a highly evasive witness, was cross-examined unduly severely. The record of the cross-examination of the witness Cresa appears on pages 136 to 147, Tr. Vol. II. Much of that portion of the record is taken up with objections by counsel for appellant.

It is noted that, in learned counsel's brief, no specific instance is given as to where the cross-examination was unduly severe or repetitious. It is respectfully submitted that any reading of the record will reveal that the trial court did not abuse its discretion with reference to the cross-examination of that witness.

IX.

THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLEES TO CROSS-EXAMINE APPELLANT BY SHOWING HIM A PAGE FROM A BOOK AND ASKING HIM IF HE COULD READ IT WITHOUT HIS GLASSES, AND COUNSEL FOR APPELLANT MADE NO TIMELY OBJECTION.

Counsel now contends that it was improper to permit cross-examination of appellant by showing him 32 *Am. Jur.*, p. 27, and pointing to the word "INTRODUCTORY" which appears in large caps on that page, while holding the book two feet from appellant's face and requesting appellant to read the word. No objection was made at the time that this experiment was performed. (See Tr. Vol. III, pp. 394, 395.) It was only after the witness answered that he could not read the large print without his glasses that counsel raised an objection. The evidence had already been

introduced. Apparently counsel was willing to have the questions asked in the event that the answers would be favorable to his client but, after the answers were given, showing that appellant could not read the exhibit, counsel objected. Even then no objection was made for the reason now set forth in appellant's statement of points. The objection that was made was to the effect that it was an improper experiment without introducing the book into evidence. (Tr. Vol. III, p. 395.) "Mr. Robertson: Well, now, that is not—I object to that kind of testimony without introducing it into evidence, to show a book around here. I don't even know what book it is."

Since no proper objection was made to the experiment at the time of the introduction of the evidence, the question may not be presented to this learned court on appeal.

> "To be available the objection must be a timely one. In order to be timely it must ordinarily be made during the trial and in time to allow the alleged error to be avoided or corrected."
>
> 4 *C.J.S.*, Sec. 246.

> "Generally, to be sufficient to preserve a question of review, an objection must specifically point out the ground or grounds upon which the alleged error is predicated."
>
> 4 *C.J.S.*, Sec. 247. (See also 4 *C.J.S.*, Sec. 290(b)aa, p. 570.)
>
> *Lazelle v. Norfolk & W. Ry. Co.*, 73 F. 2d 459;
>
> *Hill v. Douglass* (Ninth Cir.), 78 F.2d 851;
>
> *Carpenter v. Connecticut General Life Ins. Co.*, 68 F.2d 69;

American Sugar Refining Co. v. Nassif, 45 F.2d 321;

Kennedy Lumber Co. v. Rickborn, 40 F.2d 228.

Although appellees believe that this question is not properly presented, it is also respectfully submitted that the court did not abuse its discretion in allowing the appellees to cross-examine the appellant in the manner specified. In view of the fact that numerous reputable witnesses testified as to the presence of a well illuminated sign stating "Basement" upon the door leading to the basement stairway, and that the appellant denied there was such a sign at the time of his accident, the appellant's vision was a relevant fact to be considered by the jury. The testimony was undisputed that appellant was not wearing his glasses at the time of his injury, and appellant further testified that his eyesight was the same at the time that he appeared on the witness stand as it was on the night of the injury. (Tr. Vol. III, p. 394.)

It is well established that experiments and tests in cross-examination are within the discretion of the trial court. Thus it is stated at 88 *C.J.S.,* Section 46:

> "It is ordinarily within the discretion of the court before which a trial is being conducted to permit or refuse to permit experiments as well as demonstrations to be conducted before the jury, or tests to be made by the jury . . . Accordingly, the trial judge may permit or refuse to permit experiments or demonstrations before the jury according to whether or not, in his opinion, the information which may be gained thereby is sufficiently relevant and material."

This principle is discussed by Professor Wigmore in his monumental works on Evidence, Third Edition, Volume III, Section 993, as follows:

> "It is not doubtful that on *cross-examination,* so far as feasible by mere questions, the witness' physical capacity to observe (by sight, hearing, or the like) may be tested. On the other hand, it is hardly less doubtful that *extrinsic testimony* to particular instances of his incapacity in those respects would not be permissible. But mere questions on cross-examination can seldom effect much; the useful thing is usually something of a mixed nature, *i.e. experiments made in court* to test the witness' powers. These should be freely allowed, subject to the discretion of the trial Court."

The cases cited by learned counsel for the appellant do not involve situations analogous to the subject case and the most that is held by the two cases discussed is that refusal of the court to permit an experiment under the circumstances involved in those cases was not error and the cases do not hold that it would be error to permit the experiments. In fact, in the case of *Shows v. Brunson*, 159 So. 248 (Ala.), incorrectly cited in appellant's brief as 158 So. 248, the court expressly stated:

> "If limited to the typewritten portions and to the 'Bank of Lucerne' in large letters, the evidence might have afforded some test as to whether he could see as well as he claimed, but not as to whether he did or did not have his glasses on at the time . . .
>
> "Experiments or tests of this character are usually within the discretion of the trial judge

guided by a sound judgment as to whether the result will be sufficiently relevant and material to warrant such procedure."

There certainly was no abuse of discretion on the part of the trial court in permitting the test to be made as pertains to the appellant's vision in the subject case.

X.

THE COURT DID NOT ERR IN PROPOUNDING TO THE APPELLANT QUESTIONS WHICH HAD BEEN ASKED BY A JUROR.

Counsel for appellant admits that it is permissible for jurors to ask questions of witnesses. See appellant's brief, page 91. Nevertheless, he now objects to the fact that questions were propounded to the witness Tuengel by a juror. No objection was made at the time that the questions were propounded. (See Tr. Vol. III, p. 390.)

"As a general rule, objections with reference to the examination or cross examination of witnesses, not raised in the court below, will not be considered in the appellate court. This rule precludes objection from first being made in the appellate court to . . . the questioning of witnesses by jurors . . ."

4 *C.J.S.*, Sec. 295.

See:

Maris v. H. Crummey, Inc., 204 P. 259, 55 Cal. App. 573;

Ray v. Collins (Mo. App.), 247 S.W. 1098;

Coffee v. Sutton, 175 Ill. App. 331;

Wallace v. Keystone Auto Co., 239 Pa. 110, 86 A. 699;

Chicago Hansom Cab Co. v. Havelick, 131 Ill. 179, 22 N.E. 797.

Counsel objects to the fact that the identity of the juror propounding the question was not disclosed. At the trial he did not request that the identity of the juror be disclosed. Counsel also contends that the witness should be given an opportunity to express himself fully. The court never denied counsel any request to further examine witness on the subject of the juror's questioning. If counsel had doubt, as he states in his brief, that the witness had answered the question satisfactorily to the juror, he could have inquired of the panel as to whether any further questions pertaining to the matter were necessary in order fully to satisfy the jury's mind on the questions involved.

It would appear that this question raised on appeal, without any objection in the trial court, is without merit.

XI.

THE COURT DID NOT EMPHASIZE ONE VIEW OF THE CASE BY UNDUE REPETITION IN ITS INSTRUCTIONS.

In Instruction No. 5 (Tr. Vol. I, p. 106), the court stated:

> "The claims against the two defendants must be considered by you separately and you should, in each case, determine whether the plaintiff is entitled to recover against both of the defendants

> or only one of them. You may, if you so find, return a verdict against both defendants jointly or against either of them."

At the request of appellees, this instruction was amended so that it specified:

> "The claims against the two defendants must be considered by you separately and you should, in each case, determine whether the plaintiff is entitled to recover against both of the defendants or only one of them, *or against neither.*" (Italics ours.)

Certainly this did not constitute undue emphasis on the part of the court and, had the instruction not been corrected, the jury might well have felt that it was mandatory for them to return a verdict against both of the defendants or one of them.

XII.

THE VERDICT WAS NOT CONTRARY TO THE WEIGHT OF EVIDENCE AND THERE IS NO INDICATION THAT THE JURY IGNORED MATERIAL EVIDENCE BECAUSE THEY FOUND APPELLANT HAD TESTIFIED FALSELY AS TO IMMATERIAL FACTS.

Counsel contends that the verdict is contrary to the weight of all the evidence. No request was made for a directed verdict.

> "Generally the sufficiency of the evidence to authorize a recovery, or sustain a defense, will be reviewed in the appellate court when, and only when, that question has properly been raised in

the lower court by one of the methods or forms of procedure available in the particular jurisdiction or under the particular circumstances of taking a case or question from the jury . . ."

4 *C.J.S.,* Sec. 299.

In the subject case, no motion was made by counsel for appellant for a directed verdict. This learned court has frequently ruled that the question of sufficiency of the evidence will not be considered on appeal where a motion for a directed verdict was not made at the trial of the case. *Dayton Rubber Mfg. Co. of Delaware v. Sabra,* 63 F.2d 865; *Rosborough v. Chelan County, Wash.,* 53 F.2d 198; *Swift & Co. v. Daly,* 44 F.2d 40; *Sacramento Suburban Fruit Lands Co. v. Elm,* 29 F.2d 233; *Southern Pac. Co. v. Johnson,* 8 F.2d 993; *Steil v. Holland,* 3 F.2d 776; *Equitable Life Assur. Soc. of U. S. v. MacDonald,* 96 F.2d 437, cert. den. 59 S.Ct. 86, 305 U.S. 624.

Counsel contends that the only statements made by the witness Tuengel inconsistent with statements made at other times were

(1) By means of a letter wherein he referred to a sign on the basement door after first having denied, on the witness stand, that there was any sign on the door; and

(2) His denial that he had ever been convicted of a crime. Counsel has ignored many other false statements made by the appellant on the witness stand, many of which deal with very material aspects of the case. Thus the following false statements made by

appellant may well have been considered by the jury, in addition to the two referred to by counsel:

(1) Appellant stated that his net earnings were around $3,000 to $3,500 a year but, in answer to interrogatories, admitted that his earnings were $1,620.14 in 1951 and $1,803.55 in 1950. (Tr. Vol. II, p. 50.)

(2) Appellant claimed that he broke his shoulder in the fall (Tr. Vol. II, p. 23), but medical evidence showed otherwise. (Tr. Vol. II, pp. 98 and 241.)

(3) Appellant contended that he wore his cast for fifty-four days and that he marked those days on the calendar. (Tr. Vol. II, pp. 41 and 63.) The medical evidence revealed that the cast was on for three weeks. (Tr. Vol. III, p. 389.)

(4) Appellant stated that he did not know who had called him to the hospital (Tr. Vol. II, pp. 16, 52, 53), yet, when he was cross-examined as to why he did not knock before opening the door, he testified that Mr. Cresa had sent him a note asking him to come to the hospital and to come to the room without knocking. (Tr. Vol. II, p. 57.)

(5) Appellant stated that he was in great pain at any time that he used his shoulder after the accident, and that he was unable even to dress himself (Tr. Vol. II, pp. 44, 45, 46), yet an impartial witness testified to the fact that, while his arm was in a sling, appellant, after looking up and down the roadway, proceeded to remove his arm from the sling and vigorously to use a broom in cleaning off the wheels of his car. (Tr. Vol. III, pp. 370 to 373.)

There was no objection made to the instruction of the learned trial judge pertaining to the applicable law when a witness has testified falsely. The court's Instruction No. 10 specifically stated: "You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the issues." (Tr. Vol. II, p. 116.) The instruction as a whole accurately sets forth the law and properly guided the jury in its consideration of the weight to be given to testimony.

CONCLUSION.

The points raised by appellant on this appeal, almost without exception, deal with questions not properly presented to the trial court or not properly set forth in appellant's statement of points relied upon on this appeal. It is respectfully submitted that none of the specifications set forth constitute error on the part of the learned trial court, and certainly none constitute prejudicial error. There was ample evidence upon which the jury based its verdict in favor of the appellees and upon which the trial court denied appellant's motion for new trial. Accordingly, it is respectfully submitted that the judgment of the court below should be affirmed.

Dated, Juneau, Alaska,
September 21, 1956.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellees.